78-496

No. _____

Supreme Court, U. S.
FILED
SEP 22 1978
MICHAEL RODAK, JR., CLERK

In The Supreme Court of The United States

_____ Term, 1978

MARK WILLIAM RICHARDSON,
JOHN DOUGLAS GIBBS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Barton C. Sheela, Jr.
Christopher J. Schatz
3104 Fourth Avenue
San Diego, California 92103

Counsel for Petitioner
MARK WILLIAM RICHARDSON

Michael Pancer
520 "E" Street, Suite 1100
San Diego, California 92101

Counsel for Petitioner
JOHN DOUGLAS GIBBS

SUBJECT INDEX

	Page
CITATIONS	
INTRODUCTION	1
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED	4
STATEMENT	5
REASON FOR GRANTING WRIT	8
ARGUMENT	10
CONCLUSION	20
APPENDIX "A" - Opinion of the Ninth Circuit Court of Appeals	23
APPENDIX "B" - Article 36, Single Convention on Narcotic Drugs, 1961	28

CITATIONS

	Page
Cases:	
Abbate v. United States, 395 U.S. 187 (1959)	10
Abney v. United States, 431 U.S. 651 (1977)	2
Bartkus v. Illinois, 359 U.S. 121 (1959)	18
Breed v. Jones, 421 U.S. 519 (1975)	20
Green v. United States, 355 U.S. 184 (1957)	20
Galanis v. Pallanck, 568 Fed. 234 (2d Cir. 1977)	20
Houston v. Moore, 18 U.S. 1 (1820)	13
Lanza v. New York, 260 U.S. 277 (1922)	16
Nat. Organization for Reform, Etc. v. Drug Enforcement Administration, 559 F.2d 735 (D.C. Cir. 1977)	14
Nielsen v. Oregon, 212 U.S. 838 (1909)	13
Rinaldi v. United States, 434 U.S. 22 (1977)	19,20

	Page
United States v. Furlong, 18 U.S. 184 (1820)	13
United States v. Gilbert, 25 Fed.Cas. 1294 (1834)	20
United States v. LaFroscia, 354 F.Supp. 1338 (S.D.N.Y. 1973)	12
United States v. Rodriguez-Camacho, 468 F.2d 1220 (9th Cir. 1972)	12
United States v. Security National Bank, 546 F.2d 492 (2d Cir. 1976)	19
United States v. Wheeler, 46 U.S.L.W. 4243 (1978)	10,11
Statutes:	
21 U.S.C. 801(7)	12
21 U.S.C. 841	8
21 U.S.C. 846	8,21
21 U.S.C. 952	8
21 U.S.C. 960	8
21 U.S.C. 963	8,21
28 U.S.C. 1291	2
28 U.S.C. 1254(1)	2

Page

Treaties:

Single Convention on Narcotic Drugs, 1961 — 2,3,8,9, 10,11,12, 13,16

Convention, Article 35(6) — 16

Convention, Article 36 — 2,4

Convention, Article 36, paragraph 1, subdivision (a) — 12

Convention, Article 36, paragraph 2, subdivision (a)(i) — 13,14

Convention, Article 36 paragraph 2, subdivision (a)(iv) — 3,4,5,13, 14,21

Convention, Article 36, paragraph 4 — 21

Constitution:

United States Constitution, Fifth Amendment, Double Jeopardy Clause — 2,3,4,8, 9,10,21

United States Constitution, Article VI — 9

Page

Miscellaneous:

Rules, Supreme Court 22(2) — 2

Commentary on the Single Convention on Narcotic Drugs, 1961 — 14,15

IN THE SUPREME COURT OF THE UNITED STATES

_____ Term, 1978

No. _____

MARK WILLIAM RICHARDSON,
JOHN DOUGLAS GIBBS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners, MARK WILLIAM RICHARDSON and JOHN DOUGLAS GIBBS, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above action (Court of Appeal Case Numbers 77-2945 and 77-3320) June 30, 1978, affirming the order of the United States District Court for the Southern District of California, issued August 15, 1977, denying petitioners' motion to dismiss the indictment on the ground of double jeopardy.

OPINION BELOW

The opinion of the Court of Appeals of June 30, 1978, is not reported at this date, but is set forth verbatim in Appendix "A" at pages 23 through 27. The Petition for Rehearing and Suggestion for Rehearing in Banc was denied by order, without opinion, on August 25, 1978.

JURISDICTION

On August 15, 1977, the Honorable Gordon Thompson, Jr., Judge of the United States District Court for the Southern District of California, issued an order denying petitioners' Motion to Dismiss the Indictment on the ground that the Fifth Amendment's Double Jeopardy Clause, in conjunction with the provisions of Article 36 of the Single Convention on Narcotic Drugs, 1961, precluded petitioners' prosecution for an offense substantially similar to that for which they had been previously prosecuted and convicted in the courts of Guatemala. Therafter, pursuant to Title 28, United States Code Section 1291 and the holding of this Court in Abney v. United States, 431 U.S. 651 (1977), petitioners sought review of the District Court's ruling in the Court of Appeals for the Ninth Circuit.

On June 30, 1978, the Court of Appeals entered judgment affirming the trial court's denial of petitioners' motion; and petitioners' request for rehearing and rehearing en banc was denied on August 25, 1978. The

jurisdiction of this Court, to review the determination of the court of appeals, is invoked under Title 28, United States Code Section 1254(1), and Rule 22(2), Rules of the Supreme Court.

QUESTION PRESENTED

Does the Fifth Amendment's Double Jeopardy Clause preclude a second prosecution of petitioners in the United States for substantially the same conduct as was subjected to sanction pursuant to Guatemalan court proceedings in that:

(1) The existence of the Single Convention on Narcotic Drugs, 1961, (hereinafter sometimes referred to as the Convention), 18 U.S.T. 1407 (1967) establishes concurrent jurisdiction in the United States and Guatemala over conduct constituting international narcotics trafficking;

(2) The substantial involvement of United States personnel in the course of events resulting in petitioners' receiving the "greatest penalties" imposable under Guatemalan law (C.T. 126) [all references made herein to C.T. refer to the Clerk's Transcript] constituted the Guatemalan court as an agent of the United States government; and

(3) The provisions of Article 36, paragraph 2, subdivision (a)(iv), of the Convention specifically recognize and implement the Fifth Amendment's prohibition against double jeopardy as

regards criminal prosecutions conducted by signatory parties to the Convention.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The constitutional provision involved is the Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The principle treaty provisions involved are those of Article 36 of the Convention (set forth verbatim in Appendix "B" at pages 28 through 30), and in particular, Article 36, paragraph 2, subdivision (a)(iv):

> 2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

> (a)(iv) Serious offenses heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offense was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and IF SUCH OFFENDER HAS NOT ALREADY BEEN PROSECUTED AND JUDGMENT GIVEN.

18 U.S.T. at 1425 [emphasis added].

STATEMENT

On November 8, 1976, agents of the Drug Enforcement Administration (DEA) in Lima, Peru, received information from a confidential source that two United States citizens in El Salvador were awaiting a shipment of cocaine and that the cocaine would be transported to the United States by way of Guatemala and Mexico (R.T. 40, 62, 73). [All references made herein to R.T. refer to the reporter's transcript.] This information was transmitted to DEA Special Agent Richard Canus, who was attached to the United States Embassy in Guatemala City, Guatemala (R.T. 37, 73). Special Agent Canus and DEA Agent Art Medina relayed the information to high-level Guatemalan officials (R.T. 75), suggesting that the Guatemalan police post lookouts at the two major crossings from El Salvador into Guatemala (R.T. 74).

On November 12, 1976, petitioners MARK WILLIAM RICHARDSON and JOHN

DOUGLAS GIBBS were stopped by Guatemalan officials at the El Salvador/Guatemalan border (R.T. 179). A search resulted in the discovery of cocaine. Petitioners were then transported to Guatemala City and incarcerated there (R.T. 181-85).

Later, petitioners were provided with a list of Guatemalan lawyers from which to choose an attorney; although they requested an English-speaking attorney they were not given counsel who spoke English (R.T. 188-89). At one time petitioners spoke to Howard Gross, the United States Consul. Gross told them that they had no defense and to plead guilty because it would take less time to go through the courts (R.T. 191). In answer to the question whether they could be prosecuted again in the United States, Gross assured petitioners that they could not (R.T. 192).

Subsequently, petitioners signed written copies of statements they had previously been forced to make to Guatemalan authorities (R.T. 189-90). They did so without the aid of counsel (R.T. 190-91). On January 6, 1977, petitioners were found to have perpetrated the crime of illegal trafficking in pharmaceuticals, drugs or soporifics, and were sentenced to four years in prison, commutable at the rate of fifty cents of quetzal for each day, in addition to a fine of 4,000 quetzals, which if not paid would become a prison term at the rate of one day for each four quetzals not paid (C.T. 121). Background information about petitioners was provided to Guatemalan authorities

by DEA agents for sentencing purposes (R.T. 110).

Following the initial imposition of sentence by the Guatemalan trial court, Special Agent Canus discussed the case with the President of the Guatemalan Supreme Court (R.T. 103). Canus conveyed to the President dissatisfaction with the "commutable" aspect of drug-offense sentencing under Guatemalan law. Although Agent Canus claims to have made no "recommendation" concerning petitioners' sentences (R.T. 103), the President thereafter initiated a review of the sentences through his Attorney General (R.T. 104).[1/]

On February 18, 1977, petitioners' sentences were increased to five years in prison, commutable at the rate of five quetzals per day, and the fines were increased to 5,000 quetzals, which in the case of insolvency would become a prison term at the rate of one day in jail for each five quetzals not paid; civil liability was increased

---

1/ Agent Canus stated that, at the time he met with the President of the Supreme Court, he was unaware that the appellate court could increase the sentence in petitioners' case (R.T. 105). However, DEA Agent Tommy J. Harr testified that Agent Canus had told him the case was on review and that there was a possibility that the sentence would be increased. Agent Harr also believed that Agent Canus had submitted a recommendation regarding the sentence (R.T. 42-43).

to 10,000 quetzals (C.T. 128). Petitioners paid their fines and a per diem amount in lieu of physically serving the sentences (C.T. 21). Petitioners were returned to the United States in the custody of Guatemalan agents and were delivered into the custody of Drug Enforcement Administration agents at the Los Angeles Airport (C.T. 21).

On March 4, 1977, petitioners were indicted for conspiracy to import, possess with intent to distribute, and distribute cocaine in violation of 21 U.S.C. Sections 841, 846, 952, 960 and 963.

REASON FOR GRANTING WRIT

The facts of the instant case raise an issue of constitutional importance concerning the complex interaction between principles of sovereign jurisdiction, as effected by United States accession to a multinational treaty (the Single Convention on Narcotic Drugs, 1961), and the reach of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

Petitioners, having previously been convicted under Guatemalan law for narcotics trafficking, now face a second prosecution by the United States for essentially the same course of conduct as precipitated the Guatemalan prosecution. The evidence, as adduced at the hearing on petitioners' Motion to Dismiss the Indictment, demonstrated substantial involvement by United States government personnel in both

the investigative and prosecutorial stages of the Guatemalan proceedings. Moreover, the evidence further disclosed the existence of United States State Department policy calling for the formation of "judicial assistance agreements with . . . Latin American countries to assist in lightening the case load of American courts by stimulating foreign governments to engage in prosecutions, particularly in the matter of international trafficking in narcotics substances as part of the cooperative agreement under the Single Convention." (R.T. 122).[2/]

The applicability of the Double Jeopardy Clause, to a prosecution by the United States of conduct previously tried and punished under the laws of a truly foreign sovereign, is one of first impression before this Court. Interpretation of the provisions of the Convention which petitioner raises as a bar to further proceedings against him, is also properly the function of this Court as involving questions of law falling within Article VI of the United States Constitution.

In light of the ever-increasing cooperative involvement of the United States and other sovereign governments, through treaty agreement, executive policy and actual police operations, in combating illegal activity outside of the territorial confines of the

---

[2/] Testimony of Louis G. Fields, Jr., assistant legal advisor of the United States Department of State (R.T. 121).

United States, it is highly probable that other individuals will, like petitioners herein, be placed in the patently unjust position of having to defend against multiple, related prosecutions for what is essentially the same offense. Hence, a definitive evaluation by this Court of the double jeopardy considerations raised by petitioners is necessary, not only to dispose of the instant case, but to educate courts, counsel and interested government agencies as to the appropriate analytic procedure to be invoked as regards application of the Double Jeopardy Clause in this kind of case.

ARGUMENT

By Motion to Dismiss the Indictment, and through interlocutory appeal to the Ninth Circuit Court of Appeals, petitioners have argued that the Double Jeopardy Clause of the Fifth Amendment, in conjunction with the Single Convention on Narcotic Drugs, 1961, precludes further proceedings in the instant case due to the fact of their prior convictions in Guatemala.

Citing United States v. Wheeler, ___ U.S. ___, 46 U.S.L.W. 4243 (March 22, 1978), and Abbate v. United States, 359 U.S. 187 (1959), and by implication the doctrine of dual-sovereignty which those cases espouse, the Ninth Circuit's panel opinion finds no violation of the Fifth Amendment's proscription against double jeopardy on the facts of this case. To this holding petitioners object on the grounds that the interaction between the Double Jeopardy Clause and the Single Convention on

Narcotic Drugs, 1961, and the substantial involvement of United States Government personnel in the Guatemalan proceedings, precludes application of the dual-soveriegnty theory to block their claim to be free from a second prosecution in this country for what is, for all intents and purposes, the same offense (i.e., international trafficking in narcotics) prosecuted in the Guatemalan District Court.

The basic premise of the dual-sovereignty doctrine is that only through exercise of its own prosecutorial power can a sovereign government insure that the interests represented by its domestic laws will be satisfactorily advanced. Cf., United States v. Wheeler, supra, 46 U.S.L.W. at 4244.

However, the dual-sovereignty doctrine has yet to be applied to circumstances, as pertain in the instant case, where sovereign governments have by international agreement proceeded to conjointly enact and/or participate in a program designed to secure and effectuate identical interests; and, where the acts of United States Government agents have so affected the proceedings of the other sovereign as to characterize those proceedings as a defacto United States prosecution.

The Single Convention on Narcotic Drugs, 1961, is a multinational treaty directed toward control of all phases of international narcotics trafficking, both lawful and unlawful. The Convention specifically mandates that its

signatory parties shall proscribe conduct involving narcotics trafficking.[3/] Article 36, paragraph (1), subdivision (a). 18 U.S.T. at 1425.

Participation in the Convention as a signatory party neither limits nor impairs the sovereign power of member nations. Still, accession to this treaty has placed the United States in a unique relationship to the other signatory parties. Rather than defeasement or impairment of soveriegnty, accession to this treaty constituted an affirmative sovereign act conjoining the governmental powers of the United States with those of the other signatory parties so as to establish between them a state of concurrent jurisdiction over the subject matter covered by the

3/ Congress, in enacting the Drug Abuse Prevention and Control Act of 1970, specifically noted United States participation in the Convention. 21 U.S.C. Section 801(7). Court decisions have also noted that, in part, the congressional purpose behind enactment of various provisions in the Act was to "effectuate the American obligation under that treaty." United States v. Rodriguez-Camacho, 468 F.2d 1220, 1222 (9th Cir. 1972) [Section 841(a)(1)]; United States v. LaFroscia, 354 F.Supp. 1338, 1341 (S.D.N.Y. 1973) (Sections 952, 955).

Convention.[4/]

Article 36, paragraph 2, subdivisions (a)(i) and (iv), illustrate this aspect of concurrent jurisdiction specifically as regards prosecution of offenses described by the Convention.

> 2. Subject to the constitutional limitations of a Party, its legal system and domestic law,
>
> (a)(i) Each of the offenses enumerated in paragraph 1 [covering all phases of narcotics trafficking, and, by reference to Article 36, paragraph 2, subdivision (a)(ii), conspiracy to commit the same] if committed in different countries, shall be considered as a distinct offense . . ..
>
> (a)(iv) Serious offenses heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offense was committed, or by the Party in whose territory the offender is found if extradition is not

4/ Where there is concurrent jurisdiction over a particular act or type of conduct, in the courts of two states of equivalent sovereignty, then "the sentence of either court . . . might be pled in bar of the prosecution before the other . . ." Houston v. Moore, 18 U.S. 1, 31 (1820); cf. Nielsen v. Oregon, 212 U.S. 838, 384 (1909); United States v. Furlong, 18 U.S. 184, 197 (1820).

acceptable in conformity with the law of the Party to which application is made, and IF SUCH OFFENDER HAS NOT ALREADY BEEN PROSECUTED AND JUDGMENT GIVEN.

18 U.S.T. at 1425 [emphasis added].

Contrary to the apparent interpretive perspective of the Ninth Circuit panel opinion, these provisions do not provide a basis upon which to reason that the Convention expressly condones multiple prosecutions, by various signatory parties, for offenses defined by its terms. The Commentary on the Single Convention on Narcotic Drugs, 1961, which is the official interpretation of the Convention as drafted by the Secretary-General of the United Nations [see, Nat. Organization for Reform, Etc. v. Drug Enforcement Administration, 559 F.2d 735, 751 (D.C. Cir. 1977)], states that the purport of subdivision (a)(i) is:

> [N]ot to ensure the cumulative punishment of offences mentioned in paragraph 1 which form elements of a single crime of illicit traffic and are committed by the same person in different countries. It is not intended to violate the principle non bis in idem (prohibition of double jeopardy), ... The purpose of clause (i) is to give the courts of a country the necessary territorial jurisdiction in cases where they might not otherwise possess it, and in particular to ensure that a country shall have territorial

> jurisdiction over accessory acts even though the principal acts were not committed in its territory and even though it in general assigns jurisdiction over accessory acts to the courts in those districts the principal acts were committed.

Commentary, pp. 431-32.

Subdivision(a)(iv) further emphasizes the aspect of concurrent jurisdiction by requiring a signatory party to prosecute an offender, whose conduct is proscribed by the Convention, even though the offense did not take place within the territorial confines of that party. However, this subdivision also excuses compliance with the Convention's mandatory prosecutorial obligations (i.e., that signatory parties must prosecute conduct proscribed by the Convention regardless of the situs of the offense) where the offender has previously "been prosecuted and judgment given." The plain meaning of this provisions is set forth by the Commentary as follows:

> The Party in whose territory the offender is found is also not required to prosecute him if he has already been prosecuted and judged (i.e., sentenced or acquitted) in another country. Clause (iv) so provides in order not to require Parties to violate their prohibition of double jeopardy.

Commentary, p. 436 [emphasis added].

Although the dual-sovereignty doctrine has been applied in cases where the respective sovereign governments have been held to possess concurrent jurisdiction over the offense and/or the offender [Lanza v. New York, 260 U.S. 277, 384 (1922)], the instant case is distinguishable due to the existence of an agency relationship founded in both law and fact, between the criminal justice systems of the United States and Guatemala as regards the Guatemalan prosecution of petitioners.

The basis in law, whereby the criminal law processes of Guatemala and the United States may be viewed as acting in concert with regard to the prosecution of narcotics trafficking offenses, is the Convention. For it is clearly the goal of the Convention to rally its member parties behind a single, comprehensive scheme for the control of narcotics trafficking, which scheme includes mutual cooperation in the apprehension and prosecution of narcotics traffickers.[5/]

The involvement of DEA agents in combating narcotics trafficking beyond the territorial limits of the United States is well known. The facts of the instant case disclose substantial cooperative participation by federal agencies in both the investigative and prosecutorial stages of the Guatemalan

---

5/ Article 35 of the Convention provides in relevant part that "the Parties shall . . . (b) Assist each other in the campaign against the illicit traffic in narcotic drugs."

proceedings:

1. The information, which led to the apprehension of petitioners by Guatemalan authorities, was originally developed by DEA agents operating in Lima, Peru, (R.T. 40, 62, 73), and was transmitted to Guatemalan police officials by DEA Agent Canus (R.T. 75).

2. The procedure implemented by the Guatemalan authorities, to intercept petitioners at the border between Guatemala and El Salvador, was initially suggested by Agent Canus (R.T. 74).

3. DEA Agent Canus was informed of petitioners' arrest shortly after its occurrence, and went personally to the location where petitioners were being held by the Guatemalan authorities (R.T. 75-91). There Agent Canus gathered evidentiary material seized by the Guatemalan police officials. However, the DEA agents were conveniently absent during the time that confessions (suppressed on petitioners' motion in the court below) were forcibly taken from petitioners by Guatemalan authorities.

4. Petitioners entered pleas of guilty to the charges brought against them in the Guatemalan District Court on the advice of United States Consul Howard Gross. Consul Gross informed petitioners that by pleading guilty in Guatemala, they could not be prosecuted again in the United States due to double jeopardy (R.T. 191-92).

5. Background information about petitioners was provided to Guatemalan authorities by DEA agents for sentencing

purposes (R.T. 110). However, Agent Canus was not satisfied with the sentences initially imposed. He therefore gained an interview with the President of the Guatemalan Supreme Court, so as to express dissatisfaction with the sentences imposed (R.T. 42-43, 103-04). As a consequence of this act, petitioners' sentences were increased by the Guatemalan Appellate Court (C.T. 128).

The direct intervention of DEA Agent Canus in the Guatemalan appellate review process cannot in any rational manner be analogized to the simple sharing of evidence which occurred in Bartkus v. Illinois, 359 U.S. 121, 123 (1959). The impact of Agent Canus' involvement, as a representative of the United States Government, is readily apparent in the statement issued by the Guatemalan Court of Appeal upon increasing the sanctions against petitioners so as to impose the "greatest penalties determined by the law." (C.T. 126).

> It is concluded that the defendants pose a great danger considering the motives behind the offense, the harm that would have been caused if the drug that was seized from them had arrived at its final destination, the disrespect shown to the National Sovereignty and the possible consequences for international order and having before us the report made by the Embassy of the

> United States of America.

(C.T. 126)[emphasis added].[6/]

The importance, to the fair administration of the criminal justice system, of the protection afforded by the Double Jeopardy Clause is such that its basic core has been recognized as being included within the "equally fundamental constitutional right of due process." United States v. Security National Bank, 546 F.2d 492, 494 (2d Cir. 1976). Even where application of the Double Jeopardy Clause is not constitutionally mandated due to the doctrine of dual-sovereignty, implementation by federal executive policy of the basic principle of fairness inherent in it has met with the approval of the Supreme Court. Rinaldi v.

[6/] The initial sanctions imposed by the Guatemalan District Court were, considering the socio-economic environment of Guatemala, strenuous but not oppressive. More importantly the court's pronouncement indicates that consideration had been given to petitioners as individuals not posing any particular danger to society (C.T. 120). Analysis of the appellate court's judgment discloses that its concern was directed solely toward the acts allegedly committed by petitioners, and the effects which those acts might have had or did have on the national sovereignty of Guatemala, international order, AND the United States.

United States, 434 U.S. 22 (1977).[7]

CONCLUSION

"Jeopardy denotes risk" [Breed v. Jones, 421 U.S. 519, 528 (1975)], and the foremost concern underlying the Fifth Amendment's incorporation of the common law principles of autrefois convict and autrefois acquit is that no person shall be compelled to "hazard," having been once tried and convicted or acquitted, a second trial for the same offense. United States v. Gilbert, 25 Fed.Cas. 1294 (1834); cf., Green v. United States, 355 U.S. 184, 187-88 (1957).

The proceedings in Guatemala, and particularly the appellate court's judgment and the sanctions imposed thereby, establish that the Guatemalan prosecution reached, and treated with requisite severity, substantially the same conduct and interests as will be the subject of, and served by, prosecution of petitioners under the instant indictment. That Guatemala utilized a facially substantive statutory vehicle to punish activity (i.e., international drug trafficking), which the United States intends to reach by application

---

[7] A similar policy may be imputed to the Department of State in that protection against double jeopardy is a common element in extradition treaties between the United States and foreign nations. Cf., Galanis v. Pallanck, 568 F.2d 234, 238-39 (2d Cir. 1977).

of conspiracy statutes, is a result of differences in each country's indigenous legal concepts and terminology. Yet, in both instances, the ultimate characterization of petitioners' conduct, and the interests to be either furthered or protected by prosecution, are in all relevant aspects identical.[8]

The Guatemalan prosecution of petitioners bears, in both fact and law, the substantial imprint of United States Government participation. To raise the dual-sovereignty doctrine as a bar to petitioners' request not to be placed again in jeopardy, is to ignore the political and legal reality occasioned by United States' accession

---

[8] The Guatemalan Penal Code does not proscribe conspiracy to engage in narcotics-related activity in the manner of 21 U.S.C. Sections 846 and 963. Yet, this lack of a conspiracy offense directly applicable to narcotics trafficking does not constitute a violation of Guatemala's obligations under the Convention. Article 36, paragraph 4 provides that "[n]othing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a party." 18 U.S.T. at 1426. Guatemala, as is the case with most civil law countries, recognizes conspiracy as a crime only in a limited number of cases (cf., R.T. 131). Hence, for purposes of double-jeopardy analysis in this case reliance on the labels (i.e., the specific wording of the criminal charges raised in the respective jurisdictions) attached to the alleged unlawful activity will not suffice, and a discerning examination of the conduct actually sanctioned or sought to be sanctioned must be made.

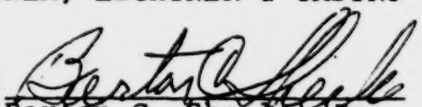
to the Convention, and the United States involvement in the Guatemalan proceedings, and subjects petitioners to the evil of being compelled to defend against multiple prosecutions for the same offense in violation of the internationally-recognized precept non bis in idem, as the same is incorporated in Article 36, paragraph 2, subdivision (a)(iv) of the Convention and in the Fifth Amendment to the United States Constitution.

For the foregoing reasons, Petitioners MARK WILLIAM RICHARDSON and JOHN DOUGLAS GIBBS respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Dated: September 20, 1978

Respectfully submitted,

SHEELA, LIGHTNER & CASTRO

By: 
Barton C. Sheela, Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARK WILLIAM RICHARDSON,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOHN DOUGLAS GIBBS,
Defendant-Appellant.

Nos. 77-2945, 77-3320

O P I N I O N

Appeal from the United States
District Court for the
Southern District of California

Before: HUFSTEDLER and KENNEDY, Circuit Judges, and EAST,* District Judge.

PER CURIAM:

Richardson and Gibbs appeal from the

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

denial of their motion to dismiss the indictment on double jeopardy grounds. We affirm.

On November 8, 1976, agents of the Drug Enforcement Agency (DEA) received information that two United States citizens would be transporting a large quantity of cocaine from El Salvador to the United States by way of Guatemala and Mexico. This information was relayed by the DEA to the national police of Guatemala. Utilizing this information, on November 12, 1976 Guatemalan police stopped and searched Richardson and Gibbs as they were entering Guatemala from El Salvador. An examination of their belongings revealed approximately thirteen kilograms of cocaine.

The Guatemalan authorities instituted criminal proceedings against the appellants. Subsequently, Richardson and Gibbs were found guilty of conducting unlawful traffic in narcotics and were sentenced to prison terms and fined. Pursuant to commutability provisions of their sentences,[1] appellants purchased

[1] Under the sentence imposed, Richardson and Gibbs could and did commute their sentence by paying five quetzals per day in addition to their fine of 10,000 quetzals. Although our holding in this case is not affected by the magnitude of the sum required to be paid under the Guatemalan law of commutability, it is interesting to note that currently the quetzal appears to be worth one U.S. dollar.

their freedom, and on April 2, 1977 they were deported to the United States.

On returning to this country, Richardson and Gibbs were indicted for conspiracy to import, possess with intent to distribute, and distribute cocaine. 21 U.S.C. §§ 841, 846, 952, 960, and 963. Before trial both moved to dismiss the indictment on double jeopardy grounds, claiming that their Guatemalan trial barred the federal prosecution. After a hearing on August 1, 1977, the district court denied this motion. We have jurisdiction to review denial of a motion to dismiss on grounds of double jeopardy by virtue of the collateral order exception to the final judgment rule. Abney v. United States, 431 U.S. 651 (1977).

We find no violation of the double jeopardy clause on the facts of this case. The Supreme Court has ruled that neither a state prosecution nor one by an Indian tribe bars subsequent federal prosecution, since in each case the initial action has been brought by a sovereign separate from the United States. United States v. Wheeler, ___ U.S. ___ (1978), 46 U.S.L.W. 4243 (March 22, 1978); Abbate v. United States, 359 U.S. 187 (1959). A fortiori, prosecution by a foreign sovereign does not preclude the United States from bringing criminal charges. If double jeopardy were applicable in such circumstances, "[p]rosecution by one sovereign for a relatively minor offense might bar prosecution by the other for a much graver one. Thus effectively depriving

the latter of the right to enforce its own laws." United States v. Wheeler, ___ U.S. at ___, 46 U.S.L.W. at 4244. The case before us illustrates the need for each sovereign to retain the authority to enforce its own laws. Although conviction in the United States of the offenses charged here could lead to serious penalties, see, e.g., 21 U.S.C. § 841(b)(1)(A), Richardson and Gibbs were permitted to avoid prison terms by paying a relatively small sum of money.

The facts indicate that United States officials and the government of Guatemala cooperated in apprehending these appellants, but that is a standard and an acceptable police practice. See Bartkus v. Illinois, 359 U.S. 121, 123 (1959) (cooperation between state and federal authorities). The enforcement efforts of the two countries were not so intimately entwined that the defendants might ask us to adopt a rule barring federal prosecution on the ground that the previous foreign trial had been brought by a governmental entity acting solely as an agent of the United States or that the prior prosecution was a cover for what was in essence a federal prosecution. Id. at 123-24.

Appellants argue that prosecution of this case is unlawful by virtue of the Single Convention on Narcotic Drugs of 1961, [1967] 18 U.S.T. 1407, of which the United States and Guatemala are signatories. Despite the ingenuity of this argument, the Convention neither affects the sovereignty of member nations nor embodies an agreement to refrain from

prosecuting a defendant who has previously been tried by another signatory nation. In fact, the Convention expressly provides:

> Each of the offences enumerated in paragraph 1 [including trafficking in narcotics], if committed in different countries, shall be considered as a distinct offence.

Id., art. 36(2)(a)(i), 18 U.S.T. at 1425. This provision is consistent with, not in derogation of, the sovereign's prerogative to institute prosecution. The indictment in this case charges appellants with conspiring in California and elsewhere to commit various drug offenses and is thus permitted by the Convention.

The district court did not err in denying the motion to dismiss the indictment.

AFFIRMED.

APPENDIX B

ARTICLE 36

Penal Provisions

1(a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding sub-paragraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

2. Subject to the constitutional limitations of a Party, its legal system and domestic law,

(a)(i) Each of the offences enumerated

in paragraph 1, if committed in different countries, shall be considered as a distinct offence;

(ii) International participation in, conspiracy to commit and attempts to commit, any of such offences, and preparatory acts and financial operations in connexion with the offences referred to in this article, shall be punishable offences as provided in paragraph 1;

(iii) Foreign convictions for such offences shall be taken into account for the purpose of establishing recidivism; and

(iv) Serious offences heretofore referred to committed either by nationals or by foreigners shall be prosecuted by the Party in whose territory the offence was committed, or by the Party in whose territory the offender is found if extradition is not acceptable in conformity with the law of the Party to which application is made, and if such offender has not already been prosecuted and judgement given.

(b)(i) Each of the offences enumerated in paragraphs 1 and 2(a)(ii) of this article shall be deemed to be included as an extraditable offence in any extradition treaty existing between Parties. Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

(ii) If a Party which makes extradition conditional on the existence of a treaty receives a request for extradition

from another Party with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences enumerated in paragraphs 1 and 2(a)(ii) of this article. Extradition shall be subject to the other conditions provided by the law of the requested party.

(iii) Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences enumerated in paragraphs 1 and 2(a)(ii) of this article as extraditable offences between themselves, subject to the conditions provided by the law of the requested Party.

(iv) Extradition shall be granted in conformity with the law of the Party to which application is made, and, notwithstanding sub-paragraphs (b)(i), (ii) and (iii) of this paragraph, the Party shall have the right to refuse to grant the extradition in cases where the competent authorities consider that the offence is not sufficiently serious.

3. The provisions of this article shall be subject to the provisions of the criminal law of the Party concerned on the questions of jurisdiction.

4. Nothing contained in this article shall affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party.

18 U.S.T. at 1425-26; 26 U.S.T. 1451-52

Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

No. 78-496

In the Supreme Court of the United States

OCTOBER TERM, 1978

MARK WILLIAM RICHARDSON AND
JOHN DOUGLAS GIBBS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-496

MARK WILLIAM RICHARDSON AND
JOHN DOUGLAS GIBBS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their prosecution for conspiring to commit various drug offenses is barred by their previous prosecution in Guatemala for drug trafficking.

1. Petitioners were indicted in the United States District Court for the Southern District of California for conspiring to import, possess with intent to distribute, and distribute cocaine, in violation of 21 U.S.C. 841, 846, 952, 960 and 963. They subsequently moved to dismiss the indictment on double jeopardy grounds. After a hearing, the district court denied the motion. On appeal of this denial, the court of appeals affirmed in a *per curiam* opinion (Pet. App. 23-27; 580 F. 2d 946 (1978)).

The evidence at the hearing on the motion to dismiss showed that on November 8, 1976, agents of the Federal Drug Enforcement Administration (DEA) received

information that two United States citizens would be transporting a large quantity of cocaine from El Salvador to the United States by way of Guatemala and Mexico (Pet. App. 24). DEA agents relayed this information to the national police in Guatemala (*ibid.*). Utilizing this information, Guatemala officials stopped petitioners at the Pedro de Alvarado Port of Entry as they entered Guatemala from El Salvador. A search of their belongings revealed approximately 13 kilograms of cocaine (*ibid.*; A. 109-110).[1]

Petitioners were tried in Guatemala and found guilty on the charge of "illegal trafficking" in narcotics (A. 119). They were sentenced to four years' imprisonment, commutable at the rate of half a quetzal for each day, and fined 4,000 quetzals (A. 120). Subsequently their sentence was increased to five years' imprisonment, commutable at the rate of five quetzals per day, and their fine increased to 10,000 quetzals (A. 128).[2] Petitioners paid their fines and a per diem amount in lieu of serving the sentences. They were returned to the United States in the custody of Guatemalan agents and delivered into the custody of DEA agents at the Los Angeles airport (A. 21).

2. Petitioners contend (Pet. 10-22) that the Double Jeopardy Clause, when read together with the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407 (1967), precludes the present prosecution.

---

[1]"A." refers to the record an appeal.

[2]The court below noted (Pet. App. 24 n.1) that on the date of its opinion in this case a quetzal was worth about one United States dollar.

They now appear to concede that there is generally no double jeopardy bar to a federal prosecution that follows a prosecution in a foreign country (see Pet. 16).[3] They argue, however, that the "dual sovereignty" doctrine is inapplicable here because the Convention does not "condone[] multiple prosecutions." In particular, they rely on Article 36(2)(a)(iv) of the Convention, which provides that serious narcotics offenses "shall be prosecuted" by the country in whose territory the offense was committed, or by the country in which the offender is found if extradition is not acceptable to that country "and if such offender has not already been prosecuted and judgement [*sic*] given" (see Pet. App. 29).

But that provision simply states that no country is *required* to prosecute an offender if he has already been prosecuted elsewhere. The clause is intended to relieve countries that would consider the second prosecution a violation of their laws, or treaty obligations, from prosecuting (see Commentary on the Single Convention on Narcotic Drugs, *supra*, at 436, cited at Pet. 15). But the Convention does not prevent a country from prosecuting if it wishes to do so, and indeed the provision on which petitioners rely is specifically made "[s]ubject to the constitutional limitations of a Party, its legal system and domestic law" (Article 36(2)). Article 36 also provides it does not "affect the principle that the offences to which it refers shall be defined, prosecuted and punished in conformity with the domestic law of a Party" (Article 36(4)).

---

[3]Neither a state prosecution nor a prosecution by an Indian tribe bars subsequent federal prosecution, since in each case the actions are brought by separate sovereigns. *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Abbate* v. *United States*, 359 U.S. 187 (1959). Manifestly, since the United States and Guatemala are separate sovereigns that

In addition, the Convention specifically provides that each of the offenses specified, including trafficking in narcotics and conspiracy, "if committed in different countries, shall be considered as distinct offence[s]." Article 36(2)(a)(i) and (ii). The Convention, therefore, appears affirmatively to authorize the present prosecution of "distinct offenses" committed in a "different country."[4]

3. Petitioners also contend (Pet. 11, 16-19) that the United States was so involved in the Guatemalan prosecution that in effect Guatemala was only acting as its agent. But both courts below considered the factual basis for this claim and rejected it (Pet. App. 26; A. 135), and there is no need for further review by this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). In any event, the cooperation of United States and Guatemalan officials in apprehending petitioners was standard police practice and did not transform the Guatemalan police—

" '[derive] power from different sources' " (*United States* v. *Wheeler*, *supra*, 435 U.S. at 320, quoting *United States* v. *Lanza*, 260 U.S. 377, 382 (1922)), the Guatemala conviction does not bar the proceedings here. See *United States* v. *Martin*, 574 F. 2d 1359 (5th Cir. 1978) (Bahamian narcotics conviction does not bar U.S. prosecution); see also *Bartkus* v. *Illinois*, 359 U.S. 121, 128 n.9 (1959) (declining to consider "dubious" English precedent on international double jeopardy).

The wisdom of the "dual sovereignty" doctrine is pointed up by this case. Petitioners were permitted to avoid imprisonment in Guatemala by paying a relatively insubstantial sum of money, although similar conduct could result in significant prison terms in the United States. See, *e.g.*, 21 U.S.C. 841(b)(1)(A).

[4]The indictment in this case alleges overt acts in the United States, Mexico, El Salvador and Guatemala.

let alone that country's courts—into agents of the United States. See *Bartkus* v. *Illinois*, 359 U.S. 121, 123-124 (1959). Petitioners do not contend that the Guatemalan prosecution was brought at the request of the United States (see Pet. 17-18); in fact, that country was merely carrying out its obligations under the treaty to prosecute persons who commit narcotics offenses in its territory (see Article 36(2)(a)(iv)).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1978

DOJ-1978-11